

## § 366.2

## 12 CFR Ch. III (1–1–02 Edition)

which may apply to such contractual activities. This part does not apply to the FDIC when acting as a conservator of a failed financial institution or when operating a bridge bank.

(b) *Purpose.* Consistent with the goals and purposes of titles 18 and 41 of the U.S. Code, this part seeks to establish:

(1) Minimum standards which govern conflicts of interest, ethical responsibilities, and the use of confidential information by contractors;

(2) Procedures to ensure that independent contractors meet minimum standards of competence, experience, integrity, and fitness; and

(3) Official written guidance to contracting personnel who award contracts for services and to contractors who bid on such contracts.

(c) *Scope.* (1) (i) This part applies to:

(A) Contractors, including law firms and other independent contractors, that are not deemed, under 12 U.S.C. 1822(f)(1)(B), to be employees of the FDIC, which submit offers to provide services to the FDIC or which enter into contracts for services with the FDIC; and

(B) Subcontractors which enter into contracts to perform services under a proposed or existing contract with the FDIC.

(ii) Contractors that are deemed under 12 U.S.C. 1822(f)(1)(B) to be employees of the Corporation are subject, in addition to this part, to Title 18 of the United States Code; the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635); the Supplemental Standards of Ethical Conduct for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3201); the Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture regulations (5 CFR part 2634); and the Supplemental Financial Disclosure Requirements for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3202).

(2) For all contractors subject to this part, the FDIC will apply this part to contracts which are entered into between the contractors and the FDIC on or after April 10, 1996. In addition, this part applies to contracts between contractors subject to this part and the FDIC which exist on April 10, 1996 for

which a contractual action, such as a modification, extension, or exercise of an option, takes place on or after April 10, 1996.

(d) *Resolution Trust Corporation transition.* This part shall apply to all RTC contractors that provide services to the FDIC after the RTC's termination which occurred, by statute, December 31, 1995.

### § 366.2 Definitions.

As used in this part:

(a) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor or is under common control with the contractor.

(b) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, or any other organization or institution, but shall not include any corporation the majority of the shares of which are owned by the United States, any state, or the District of Columbia.

(c) *Conflict of interest* means a situation in which:

(1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract; or

(2) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, is an adverse party to the FDIC, RTC, FSLIC, or their successors in a lawsuit; or

(3) A contractor; any management officials or affiliated business entities of

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a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, has ever been suspended, excluded, or debarred from contracting with a Federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or

(4) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

(d) *Contractor* means a person which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services.

(e) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(f) *Default on a material obligation* means a loan or advance from an insured depository institution which has ever been delinquent for 90 or more days as to payment of principal or interest, or a combination thereof, with a remaining balance of principal and accrued interest on the ninetieth day, or any time thereafter, in an amount in excess of \$50,000.

(g) *FDIC* means the Federal Deposit Insurance Corporation in its receivership and corporate capacities. It does not mean the FDIC in its conservatorship capacity or when it is operating a bridge bank as defined, respectively, in 12 U.S.C. 1821(c) and (n).

(h) *Insured depository institution* means any bank or savings association

the deposits of which are insured by the FDIC.

(i) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership whose management committee or executive committee has responsibility for the day-to-day operations of the partnership, management official means only a member of such committee but, if no such committee exists, management official means each of the general partners.

(j) *Offer* means a proposal to provide services to the FDIC. For law firms or sole practitioner lawyers, "offer" also means the application submitted by the law firm to the FDIC.

(k) *Pattern or practice of defalcation regarding obligations* means two or more instances in which:

(1) A loan or advance from an insured depository institution is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof and there remains a legal obligation to pay an amount in excess of \$50,000; or

(2) A loan or advance from an insured depository institution where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000 to the insured depository institution.

(l) *Person* means an individual or company.

(m) *RTC* means the former Resolution Trust Corporation in any of its capacities.

(n) *Subcontractor* means a person that enters into a contract with an FDIC contractor to perform services under a proposed or existing contract with the FDIC.

(o) *Substantial loss to Federal deposit insurance funds* means:

(1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), the FRF, or funds maintained by the RTC for the benefit of insured depositors, that is or has ever been delinquent for ninety (90)

or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of \$50,000;

(2) An obligation to pay an outstanding, unsatisfied, final judgment in excess of \$50,000 in favor of the FDIC, RTC, FSLIC, or their successors, or the BIF, the SAIF, the FRF or the funds maintained by the RTC for the benefit of insured depositors; or

(3) A loan or advance from an insured depository institution which is currently owed to the FDIC, RTC, FSLIC or their successors, or the BIF, the SAIF, the FRF or the funds maintained by the RTC for the benefit of insured depositors, where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000.

**§ 366.3 Appropriate officials.**

(a) The General Counsel of the FDIC, or the designee of the General Counsel, shall administer the provisions of this part with respect to contracts involving the provision of services by law firms or sole practitioner lawyers.

(b) The FDIC Executive Secretary, or the designee of the Executive Secretary, shall administer the provisions of this part with respect to all other contracts.

**§ 366.4 Disqualification of contractors.**

(a) *Disqualifying conditions.* No person shall perform services under an FDIC contract and no contractor shall enter into any contract with the FDIC if that person or contractor:

- (1) Has been convicted of any felony;
- (2) Has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation or their successors;
- (3) Has demonstrated a pattern or practice of defalcation regarding obligations; or

(4) Has caused a substantial loss to Federal deposit insurance funds.

(b) *Contractors with disqualifying conditions arising prior to contract award.* (1) A contractor which has any of the disqualifying conditions identified in paragraph (a) of this section prior to the award of an FDIC contract is disqualified and is prohibited from entering into contracts with the FDIC.

(2) If after submitting an offer but prior to award, a contractor discovers that it has any of the disqualifying conditions identified in paragraph (a) of this section, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier.

(c) *Disqualifying conditions that arise or are discovered after contract award.* A contractor must notify the FDIC in writing within 10 days after discovering that it or any person performing services under an FDIC contract has any of the disqualifying conditions identified in paragraph (a) of this section. Such notification shall contain a detailed description of the disqualifying condition and may include a statement of how the contractor intends to resolve such condition. The FDIC, after receipt of such notification or other discovery of the contractor's disqualifying condition, shall take such action as it determines is in the FDIC's best interests, including that:

(1) The FDIC may notify the contractor in writing of the corrective actions, if any, which the contractor must take to eliminate the disqualifying condition. Corrective actions must be completed by the contractor not later than 30 days after notification is mailed by the FDIC unless the FDIC, at its sole discretion, determines that it will be in the best interests of the FDIC to grant the contractor an extension of time in which to complete such corrective action;

(2) The FDIC may immediately declare any contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under the contracts; or

(3) The FDIC may declare any contracts with such contractor in default and temporarily waive such default in order to allow an orderly transfer of